

## Central Law Journal.

ST. LOUIS, MO., DECEMBER 9, 1910

### DISTINCTION AS TO PAST DUE INSTALLMENTS FOR ALIMONY AND FOR SUPPORT OF CHILDREN.

We discussed in 71 Central Law Journal 55, the case of *Sistare v. Sistare*, 218 U. S. 1, which reversed the Connecticut Supreme Court of Errors in its construction of the New York statute allowing modification of divorce decrees so far as they referred to instalment payments of alimony.

The trouble in the mind of the Connecticut court was in its interpretation of the opinion in *Lynde v. Lynde*, 181 U. S. 183, and in the *Sistare* case it is stated by Mr. Justice White, following upon a discussion of *Barber v. Barber*, 21 How. 582 and the *Lynde* case, that: "When these two cases are considered together, we think there is no inevitable and necessary conflict between them, and in any event, if there be, that *Lynde v. Lynde* must be restricted or qualified so as to cause it not to overrule the decision in the *Barber* case." The latter case ruled that, though a divorce decree is subject to modification as to instalment payments of alimony, nevertheless as to past due instalments the decree came under the faith and credit clause of the constitution.

The opinion in the *Sistare* case was handed down on May 31, 1910, and most probably had not come to the notice of the Supreme Court of Oklahoma, when, on July 12, 1910, it handed down its decision in *Bleuer v. Bleuer*, 110 Pac. 736. In this decision the Oklahoma court contents itself with referring to *Mayer v. Mayer*, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. Rep. 477, as one of the best considered opinions on the subject of past due instalments in divorce coming under the protection of the faith and credit clause.

Looking at the *Mayer* case, we see it relying on the *Lynde* case just as did the Connecticut case, except that the Michigan court distinguishes between instalments for alimony and those for maintenance and support of children, predicated this distinction on the Oklahoma statute specifically providing that the latter are subject to modification and not in terms so stating as to instalments for alimony.

In the first place we greatly doubt whether such statutory provision was necessary, as we believe it a well-recognized principle, that where alimony is not awarded in a lump sum, or support for children in a lump sum, there is reserved the right to modify the decree, just as there certainly exists the right to modify any decree as to custody, care and education of the children.

But, taking it that the Oklahoma statute did so provide, we think it is well pointed out by the *Sistare* opinion, that a construction, which would deprive past due instalments for maintenance and support of children of the benefit of the faith and credit clause, was not within the intent of any such legislation. Such a provision is presumably for the benefit of children and it should not be turned into a sword against them.

This is precisely the kind of error the Connecticut court fell into and responsibility therefor would seem reasonably attributable to the *Lynde* case, which, now, the painstaking discussion by Justice White, in the *Sistare* case, should forever set at rest, and in that discussion the court came about as near admitting, that our great tribunal was inconsistent in its utterances as we may ever hope it will admit.

We believe the accepted doctrine is, that an award of alimony in a divorce decree is absolute after expiration of the term of its rendition, unless the decree reserves the right to modify, or statutory power therefor is given. See 2 Am. & Eng. Encyc. of Law 136, for authorities. But, as in the absence of statute, the power to modify was deemed to reside in a court of equity, pro-

vided its decree reserved it, statutes providing for its exercise are to be construed as merely bridging over the failure to expressly reserve, in decrees, such power as amounting to a judgment releasing the parties from its further jurisdiction.

No such thing, however, should be considered needed, where maintenance, education and support of offspring are concerned. For a divorce decree to be deemed so sacred, when it attempts presently to award them support, that it may not be opened in behalf of children, whether reservation therefor is made by statute or the decree itself, is to establish sanctity for what has been adjudged, when the children have never had their day in court.

We believe it has been held that the obligation to support children is not released as to either parent by divorce, and, if the method of securing this support has found place in divorce decrees, it ought to be made by courts as fairly commensurate with the rights of children as possible.

Decision as to awards in divorce being unalterable after the term in which they are made, except as provided for, may or may not be sound, when these awards are of alimony, but it is illogical, we think, to say the principle applies as well to awards for the benefit of children.

However, the case of *Sistare v. Sistare* is very important as settling the question of past due instalments, whether they be of alimony or for support of children, being protected by the faith and credit clause of the constitution.

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## NOTES OF IMPORTANT DECISIONS

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**EXECUTORS AND ADMINISTRATORS—SUIT ON FOREIGN JUDGMENT.**—It appears from the case of *Moore v. Kraft*, 179 Fed. 685, decided by Seventh Circuit Court of Appeals, that one Moore was appointed by a probate court of Arkansas administrator of the estate of Sallie B. Kraft, who at the time of her death was domiciled in Illinois. She died leaving real and personal property and creditors in Arkansas.

As administrator he sued F. W. Kraft in an Arkansas court and obtained judgment. He brought suit on this judgment in Illinois and defendant pleaded that he had been appointed administrator of deceased at her domicile; that Moore was only ancillary administrator; that all the assets of intestate's estate were subject to distribution in Illinois and that such ancillary administrator "has no right, power or authority to maintain an action in the state of Illinois for the recovery of any of the assets of the estate of said Sallie B. Kraft, deceased."

This plea was demurred to on the grounds of res adjudicata and that "after judgment the debt became personal to the plaintiff, the style administrator being merely descriptive and not essential to a recovery."

This demurrer was overruled and this ruling the Circuit Court of Appeals reverses.

The court said: "When Moore, in the right of his intestate, sued Kraft in Arkansas and obtained the judgment in question, the original cause of action became merged in the judgment, and the judgment became the legal evidence of a new debt, for the non-payment of which a new cause of action would arise. Now this new cause of action never belonged to Mrs. Kraft, and so it would be logically impossible for Moore to sue upon it in her right. If a person buys or leases property from an administrator or receiver, the consideration is promised to be paid to a living person, who sues by virtue of what he has done, not by virtue of what the deceased or insolvent had done, and whatever he may do or be obligated to do with the consideration when he collects it, is wholly irrelevant to the issue."

The court from this concludes that the demurrer to the plea should have been sustained.

This ruling is technically correct, in one aspect, but should the judgment have been thus treated in the case that was decided? In the cases in which it was held that the administrator should sue in his own name the administrator was that of the domicile, but in the case at bar an ancillary administrator carries into the domicile to collect that which the resident administrator should collect. The rule seems not one to interfere with a domicile but to aid it. In the cases in which the rule was announced the proceeds were to be taken to the domicile and there distributed. Here the reverse is the case. Does not this afford by a technical rule, an advantage to foreign over domestic creditors? If it is so that the domestic debtor paying the judgment ceases to owe the estate, though the latter judgment belongs to the foreign administrator personally, ought not the jurisdiction of the domicile to refuse, aid in its collection? The reason of the rule seems to us to fail in the case of

ancillary administration, and, if the maxim *cessante ratione legis cessat ipsa lex* is sound, a *fortiori* should reason displace a mere technicality.

**MECHANICS' LIENS—STRICT CONSTRUCTION AS TO LIENABLE ITEMS.**—In the case of *Gilbert Hunt Co. v. Parry*, 110 Pac. 541, Supreme Court of Washington, the question was whether or not tools and appliances specially procured to be used in the construction of buildings, structures and ditches of an irrigation plant were "material to be used in the construction, alteration and repair of" said plant.

The court took the view that such statutes were only meant to secure a lien to the laborer and materialman for that which "goes into the finished structure," "that material which 'becomes a part of the finished structure.'"

This reasoning would seem more proper if the question were of the right of a contractor to recover for his work, but it does not seem altogether clear that a hardware merchant who furnishes necessary material for the prosecution of a contractor's work should not have a materialman's lien as well for tools as for nails that go into a structure. The contractor's price is figured upon the necessity of buying tools as well as upon buying lumber or nails, and one is as necessary for the building's completion as the other.

The statute of that state said a lien accrues for "furnishing material to be used in the construction, alteration or repair," etc. It does not say the material shall go directly into the structure or be a part thereof. Labor is not a part of the structure after it is completed. A tool worn out in work of construction is in a sense in the structure, just as labor is there. It rather seems that by this ruling the court works out a discrimination against a certain class of materialmen that the statute does not intend.

**BANKS AND BANKING—BANK CREDITING ITS DEPOSITOR WITH A DEPOSIT IN ITS FAVOR IN ANOTHER BANK.**—The case of *Bank of Big Cabin v. English*, 111 Pac. 386, decided by Supreme Court of Oklahoma, presents what appears to be a novel and very important question for bankers. We feel justified in saying this is a novel question because the learned court in a very careful opinion citing and discussing many cases relies only on analogy for its conclusion.

The facts show that a shipper consigned a car load of hogs to a commission firm of Kansas City, Mo., with instructions to forward the proceeds to Bank of Big Cabin, Oklahoma, of which the shipper was a depositor. The

commission firm, instead of doing this, deposited with the Interstate National Bank, its check to the credit of the Big Cabin Bank, and the Interstate Bank ascertaining from the Bankers' Directory that the Bankers' Trust Company of Kansas City was designated as the correspondent of the Big Cabin Bank, notified it that its account was credited by direction of the shipper with the amount to account of the Big Cabin Bank. It also notified the Big Cabin Bank that its account was thus credited with Bankers' Trust Company. The Big Cabin Bank received this notice on October 25. On October 26, the Bankers' Trust Company drew on the Interstate Bank for the amount and its draft was paid through the clearing house. On October 28, the Bankers' Trust Company closed its doors. Between October 25 and October 28, the Big Cabin Bank credited the shipper's account in its bank. On October 29, the Big Cabin Bank wrote the Interstate Bank that it had never authorized any credit being placed by it in the Bankers' Trust Company and it would look to it for protection. On the same day it advised its customer that it would charge this credit back to him. The shipper having recovered judgment against the Big Cabin Bank, the Supreme Court reversed the decision on the theory that this credit was only provisional and the sole responsibility of the Big Cabin Bank, if any, was to have used due diligence in collecting this credit. The cases relied on by the Oklahoma court are those in which a depositor is given credit for checks he deposits on the supposition that they will be paid, which credit is, of course, revocable, unless by fault of the collecting bank they are not collected.

We confess our inability to see any parallel or that there is any analogy subsisting between such cases and the one before the court.

In limine the commission firm did not do what it was directed to do, but it directed its bank to do it. Its bank did not do it either, but it selected another to do it. If that other had in fact been the correspondent bank of the Big Cabin Bank that was a matter with which the shipper had no concern. Up to this point the commission firm would appear to be still indebted to the shipper. But what happens? The Big Cabin Bank says, in effect: "I (not you) have a credit in the Bankers' Trust Company. This is satisfactory to me, and I, owing you for obtaining that credit give you another credit on my books." This being accepted by the shipper, the Big Cabin Bank acquires a credit in the Bankers' Trust Company as its property. The Big Cabin Bank up to the moment it thus intervenes could have declared itself a stranger to all that had transpired, but it does no such

thing. It acquiesces in what has been done and acts so as to change what was in the nature of a trust fund in its hands into its absolute property. It had up to that moment no obligation to collect that credit, as the shipper's property, and it never assumed any such obligation so far as the shipper was concerned. He, as well as the Big Cabin Bank, had a right to repudiate all that had been done, and it would seem by every fair construction, that the bank ratified it, while he still remained quiescent.

It is further to be said, that, as the Big Cabin Bank was notified in time to have prevented the insolvent bank from realizing on that credit, and its depositor was to its knowledge not so notified, he ought not to have been caught between the upper and nether millstones of convenient usage between banks. If the usage was a good thing for the banks, the maxim *qui sentit commodum, sentire debet et opus* should apply. Hughes G. & R. 299.

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WHERE DEFENDANT IS A NON-RESIDENT, BY WHAT ACTS, WITHOUT TAKING UP RESIDENCE THEREIN, CAN HE MAKE IT POSSIBLE FOR THE LEGISLATURE AND THE COURTS OF ANOTHER STATE TO ADJUDICATE AGAINST HIM WITHOUT HIS CONSENT?

Two cases recently decided in an Illinois appellate court,<sup>1</sup> present a question of such general interest, in view of the fact that it has not yet, in my judgment, been squarely presented to the United States Supreme Court, that I think them worthy of extended examination. I do not propose, however, to present any extended review of authorities, as I believe it would not assist in understanding of the defined question I wish to present. One of these arose in Texas, the second in Nebraska. They present similar, though not identical facts, and involve only questions, which I propose to discuss with reference to the Texas case.

An insurance company having its home office in Illinois and existing under the

laws of that state, but never licensed to do business in Texas, had a large number of policy-holders in the state of Texas, derived by the absorption of another concern, licensed by that state when the insurance was first written. On the death of one of the policy-holders of that class, suit was brought by his beneficiary in a Texas court and service was had upon a person alleged to be an agent of the insurance company. The general counsel of the defendant, denying that the person named was its agent, filed a special appearance, which is conceded to have been sufficiently guarded to prevent its having any effect to confer jurisdiction under the practice in either state. The sufficiency of the service on the alleged agent is doubtful, and the present question is not affected thereby. It appeared, however, that the state of Texas has a statute providing in effect that wherever a special appearance is entered and the court, upon trial of the issue, finds that the court had not jurisdiction of the defendant, for any defect in service or otherwise, the "defendant shall be deemed to have entered his appearance to the succeeding term of court." Now, this in effect converts a denial of jurisdiction into a submission to it, which may be other than logical. Yet, wherever the jurisdiction of the subject-matter exists and that of the person can be easily obtained, where, in short, the objection to the jurisdiction is based only on a mistake of form or method, there can be no substantial objection in justice. Some Texas cases, for instance, have applied this statute in cases where service was made by a town marshal or some other officer, and it was held that the officer had no power to make service of summons. Now, of course, it really makes no difference to a defendant whether a bit of paper containing certain information and notifying him to appear and defend the action, is handed or read to him by one officer or another, and a continuance at his request is certainly all he can ask. No doubt it was for these cases the statute was adopted, though for the present question at least no denial is made that it is broad enough in

(1) Wright v. Cosmopolitan Life Insurance Association and Wilkinson v. Same. Opinion not yet published.

terms to include the case of a special appearance.

But the question here presented is quite a different one. For here the judgment debtor was not in Texas and had no intention to submit to the Texas jurisdiction, yet judgment was entered by the court of that state, upon which an Illinois court has since entered judgment. The question therefore is, the power of the state of Texas, through its legislature and courts, to seize upon property in Illinois and transfer the ownership of it from one person to another, through the device of construing a denial of jurisdiction as a submission to it.

In the actual fact I think this question was obscured by the mass of pleadings in the case, and was not clearly presented to the court of Illinois. And that it may be freed from all questions of similar appearance, but not actually involving the same legal principles, let us note first, some things that are not denied. I have already accepted the application of the statutory rule where the objection is only to lack of proper form or method of service. Second, it is conceded that so far as property within the state is concerned, the legislature has in general the right to determine what rules shall obtain as to the method of subjecting that property to the satisfaction of claims against the owner. If, therefore, the property of a non-resident be sold in the state of Texas upon a judgment obtained in the courts of that state, and in accordance with its statutes, the title of the defendant will be divested, even though he be a non-resident and not served with process. Should the property be thereafter removed to another state, the courts of that state will recognize the title of the purchaser as against the former owner. This merely means that each state is supreme over persons and property within its own limits. Now set over against this, the other proposition, which is really the same thing, from the opposite standpoint, that each state has exclusive authority within its own limits; that is to say, that no other state can exercise any authority within

these limits. Yet in the present case the Texas court in effect assumed jurisdiction over property in Illinois.

In the simplest form no one now controverts the proposition, though attempts were made, in the early history of this country, to compel non-residents of a state to defend themselves in its courts, though not served with process therein. Thus, it is beyond controversy that if the sheriff of a New York county holding a summons from his own court should go across the line into New Jersey and there serve it upon a resident of that city, the service and all proceedings following upon it are absolutely nugatory.

But, again, it is conceded that a defendant may voluntarily submit himself to the jurisdiction of a court which could not otherwise bind him, and thereupon the court shall be clothed with exactly the same power as if he were a resident amenable to its process. In the present case, it will be noted, the attempt was to subject a non-resident, not intending to try his case in the courts of Texas, to the judgment thereof, because the legislature has assumed the power to construe a given act so as to make it very different from that which upon its face it was. The question may be stated thus:

Where a defendant is a non-resident of a given state and therefore not primarily subject to its courts, or to its legislative authority, by what acts, without taking up residence therein, can that defendant make it possible for that legislature and those courts to adjudicate against him without his consent?

That the legislature cannot arbitrarily give authority to its courts over non-residents appears from *Pennoyer v. Neff*,<sup>2</sup> where the whole question is exhaustively discussed, and in which it was decided that a judgment on service by publication in an Oregon court, in form in personam, was insufficient to authorize sale even within that state.

In this case it is not clear that the legislature of Oregon had attempted to provide that substituted service by publication on a non-resident should be foundation for a personal judgment. The attempt, however, was to do that very thing, and the discussion by the court was of the broad and general question of the power of the state, as is explicitly stated by Mr. Justice Hunt in his dissenting opinion. Another general rule is many times stated in the case last cited in forms somewhat after this fashion:

To give such proceedings any validity he must be brought within its jurisdiction by service of process within the state or his *voluntary appearance*.<sup>3</sup>

Cooley, as quoted in the court's opinion cited, puts it thus: "Due process of law would require *appearance* or personal service before the defendant could be personally bound by any judgment rendered."<sup>4</sup>

On the other hand the Supreme Court of the U. S. in *York v. State of Texas*,<sup>5</sup> affirms *York v. State*,<sup>6</sup> wherein the same provision was appealed to as here in question; that is to say, there was an attempt at special appearance, and the Texas court assumed jurisdiction on the strength of the statute above referred to, which in effect converts the special appearance denying jurisdiction into a general appearance accepting it.

Now, taking the rule announced in *Pennoyer v. Neff*, let us apply it to the *York* case in order to see whether the two decisions are reconcilable and what the effect of the two together is. Mr. Justice Hunt strongly dissents in the *Pennoyer* case on the ground that within its own limits the state can do as it chooses, and all men are subject as to proper rights and personal relations to the courts of the state, acting in such manner as the legislature may direct. In that case, in fact, the property disposed of was within the state, and no doubt was raised that the legislature might provide

in its discretion for means by which courts should proceed so as to effectually cut off the title. The objection which was held by the majority of the court to be fatal, was that a personal judgment was entered, and the land sold under an ordinary execution, whereas it was conceded that if an attachment had been levied as the beginning of the suit, and upon judgment sale had been had under the attachment, the title would have passed—and this on the theory that attachment or other direct process of seizure at the beginning of the action would be sufficient notice, whereas a defendant, knowing the process worthless at the beginning, would have no means of knowing the fact that life had been breathed into the invalid judgment by levy upon the land.

For the application of the particular case, the courts find it necessary to discuss the general rule, under which, as they announce it, a defendant can be affected by a judgment only in two cases:

1. Where there is direct service within the state, and,
2. Where the defendant makes voluntary appearance.

The first of these is not asserted to have been present in the case now under discussion. The question, therefore, is whether in the cases under consideration this rule has been satisfied; in other words, was there a *voluntary appearance* within the meaning of the rule as above announced? As it chanced, the Texas court in the *York* case throws some light upon the question. They say<sup>7</sup> "The record before us, however, leaves no ground for claim that appellant intended voluntarily to submit to the jurisdiction of the court, which from first to last he resisted." And the same court defines the term voluntary appearance as follows: "An appearance is said to be strictly voluntary when without service of process a defendant in some manner indicates his intention to submit his person and his cause to the jurisdiction of

(3) L. C. P. Ed., page 572.

(4) Const. Lim. p. 405.

(5) 137 U. S. 604.

(6) 37 Texas, 6-7.

(7) P. 655.

the court." This definition is, I submit, correct, and is exactly what the United States Supreme Court meant. The Texas court, however, in the Yorke case, having conceded that there was no service or voluntary appearance, proceed nevertheless to enforce a judgment on the ground that the legislature had provided a substitute for a voluntary appearance. Here there seems to be a violation of the rule in *Pennoyer v. Neff*. And the United States Supreme Court affirms the judgment in the Yorke case. The apparent conflict disappears when it is recollected that in the Yorke case the validity of the Texas judgment within that state was alone at stake, while in the *Pennoyer* case, though the validity within the state was directly involved, the general question was raised, and discussed, of the availability of the judgment, so that it might be enforced wherever the defendant or his property should be found.

Let us then make a complete statement of the rule, as it seems to be left by the two cases: In order that a judgment shall everywhere be valid and enforceable, there must be either personal service within the state or a voluntary appearance of the defendant with the intent to submit to the jurisdiction.<sup>8</sup> To be valid within the state, it is necessary only that the statutory method be followed,<sup>9</sup> provided, however, that the method adopted be such as to give reasonable notice of the proceedings.<sup>10</sup>

In order to appreciate more clearly the point to be made, let us take certain illustrations. Suppose that the legislature of Texas should enact that where any resident of another state should make a contract within the state of Texas, with a citizen thereof, in all actions growing out of said contract, it should be competent for the plaintiff resident in Texas to give notice in writing to the non-resident at his home, and that upon filing proof of delivery of such notice the plaintiff might proceed to judgment without further service.

(8) *Pennoyer v. Neff*.

(9) *Yorke v. State*.

(10) *Pennoyer v. Neff*.

If the judgment is enforced only in Texas, this may conceivably be sufficient. But does any one assert that suit could be sustained on that judgment in Illinois? Yet the construction of the rule as summed up by the Texas case in the Yorke case and the United States Supreme Court in the same case, is that if the legislature chooses to lay down a rule of procedure, that rule is binding even when suit is brought on the original judgment in another state, *unless both these courts contemplated only the validity of the judgment in the state of origin*. The last seems to me the only possible construction, otherwise the wildest absurdities might be perpetrated. It might be enacted, for instance, that if suit be commenced by publication or some other method confessedly not sufficient to justify a personal judgment, and any single officer or even stockholder of the defendant corporation should be present in court during the hearing, that then the defendant should be deemed to have consented to the jurisdiction. Then, if the rule is as broad as is urged, so that the legislature's act cannot be questioned, the property of the defendant could be taken from it in a distant state without any opportunity to be heard on the merits and without knowledge even that this possibility existed.

In the present cases the judgment is based on the act of the attorney for the company, acting in a state of whose bar he was not a member, never professing to have any authority to confer jurisdiction. An attorney has certain defined authority to conduct the case in court, never to confer jurisdiction, and the rule contended for as applied to enforcement of the judgment in another state seems to me for this reason also to be impossible.

I submit, therefore, that the judgment of the Texas court, though perhaps valid and enforceable within that state, having no foundation either of personal service or of voluntary appearance, was invalid and non-enforceable out of that state and should have been so held by the courts of Illinois.

E. M. WINSTON.

Chicago, Ill.

## JUDGMENT—RES JUDICATA.

PEOPLE ex rel. J. & M. HAFFEN BREWING CO. et al. v. CLEMENT, Commissioner of Excise.

Supreme Court, Special Term, New York County, May, 1910.

124 N. Y. Supp. 748.

In determining whether the former holder of a surrendered liquor tax certificate had sold liquor on Sunday, the acquittal of his barkeeper on a charge of having made the sale referred to is not *res judicata*.

Application by the People, on the relation of the J. & M. Haffen Brewing Company and others, for a writ of mandamus to Maynard N. Clement, Commissioner of Excise. *Alternative writ granted. Order reversed* (124 N. Y. Supp. 102).

WHITNEY, J.: This is a mandamus proceeding to compel the payment of a rebate upon a surrendered liquor tax certificate under section 24 of the liquor tax law (Consol. Laws, c. 34). The certificate was issued to one Debold, by whom it has been assigned to the petitioner. The proceeding is based upon a contract between the licensee and the state, and petitioner has the burden of proving certain conditions precedent, including nonviolation of the law during the year for which the license was issued. People ex rel. Munch Brewing Co. v. Clement, 117 App. Div. 539, 102 N. Y. Supp. 779. Petitioner alleges this, and the allegation is denied. This raises an issue, but the motion has been argued by both sides on the theory that a peremptory writ must issue unless the state can take advantage of a certain violation pleaded in the answer, namely, that just after the commencement of the year Debold left a door unlocked on a Sunday, and by his agents, servants, bartenders, and persons in charge of said premises sold two glasses of lager beer, which were drunk on the premises. It is admitted in the pleadings that a bartender has been tried and duly acquitted on the charge of unlawfully violating the provisions of the law on this date.

Petitioner insists that the acquittal operates as *res judicata*. There are various answers to this contention. The wrong bartender may have been tried. Debold may have unlocked the door himself; indeed, he is alleged to have done so. The acquittal was in a proceeding to which Debold was not a party, by whose result, if adverse, he would not have been bound, and by whose favorable result he is therefore not advantaged. Furthermore, even if Debold had been the party prosecuted and if the prosecution

had covered the entire offense, the acquittal would not be conclusive upon a civil action or proceeding involving the same issue, and this for the reason, among others, that in one case the state must establish its contention beyond a reasonable doubt, while in the other it is enough to make it out by a preponderance of evidence. This has long been generally recognized by courts and text-writers. 1 Greenl. Ev. § 537; Big. Estop. (5th Ed.) 115, 116; 1 Freem. Judg. § 319; 2 Black, Judg. § 529, and cases cited. It is the prevailing opinion in our own state. People v. Snyder, 90 App. Div. 422, 86 N. Y. Supp. 415. There would probably never have been a doubt about it but for the decision of the Supreme Court of the United States in Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, which held a civil action to recover a penalty to be so far penal in nature that acquittal for the same offense would be regarded as *res adjudicata*. That case was submitted for the government upon an argument grossly insufficient, and without citation of the authorities bearing upon the point. While it has been followed by the federal courts and in certain states upon the precise point involved, its reasoning has been since practically overruled by the Supreme Court, and it has been considered and held inapplicable in this state in the opinion above cited. Petitioner is not entitled to a writ of peremptory mandamus, but an alternative writ may issue.

Ordered accordingly.

NOTE.—*Penalties Under Federal Statutes Differentiated from Those Under State Law.*—The animadversion cast by the opinion in the principal case has led us to a review of some of the federal cases, with the result of showing, as we believe, that the nature of federal control requires that they be considered criminal or quasi-criminal while this is not so under State law. We append some of these cases. In the case of Coffey v. United States, which is animadverted upon by Judge Whitney, there was a proceeding *in rem*, seeking the forfeiture of materials, utensils, etc., in illicit distilling, and it was pleaded in bar that the owner thereof had been tried and acquitted of the offense whereby the said property was claimed to have been forfeited. The opinion by Justice Blatchford, unanimously agreed to, upholding this plea of *res judicata*, said: "It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subse-

quent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences, following a judgment adverse to the claimant." The court then proceeds to say that, were an acquittal in a criminal prosecution pleaded in an action by an individual, "the rule does not apply for the reason that the parties are not the same; and, often for the additional reason, that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this action, as we have already seen the parties and matter in issue, are the same."

The reasoning of the learned justice, while far from persuasive, shows, nevertheless, that the theory, that a higher degree of persuasiveness being required in criminal than in civil cases, prevented the application of the doctrine of *res judicata*, was repudiated. That this repudiation is illogical we think is easily demonstrable.

The assumption that punishment criminally or forfeiture civilly was attached to guilt is erroneous. The former attaches to a verdict of guilt based upon evidence of a certain weight in the minds of the triors, and the latter attaches to a similar verdict based on evidence of less weight. The judge might entertain the conviction that there was no actual guilt at all, but according to due process of law a punishment or a penalty is adjudged. If the court's reasoning were correct, the ultimate analysis of its position is that, where there are both a criminal punishment and a civil penalty affixed to the doing of a certain thing, an individual sued for the latter could demand that he be first prosecuted or that proof of the penalty be established according to the rule in a criminal proceeding. It would seem, that, if for any reason he has a right to have a higher degree of certainty applied as to the doing of what involves a civil penalty, the government should not be permitted to adopt any course which would deprive him of this right, as for example, trying the civil case first and the criminal case afterwards.

In *Stone v. United States*, 167 U. S. 178, it was claimed that the doctrine in the *Coffey* case was a complete defense to an action by the government to recover for timber unlawfully cut from government lands; but Mr. Justice Harlan said: "The present action is unlike that against *Coffey*. This is not a suit to recover a penalty, to impose a punishment or to declare a forfeiture. The only relief sought here is a judgment for the value of property wrongfully converted by the defendant. The proceeding by libel against *Coffey*, although civil in form, was penal in its nature, because it sought to have an adjudication of forfeiture of his property for acts prohibited." The justice then makes the following extract from *Boyd v. U. S.*, 116 U. S. 616, 634: "Suits for penalties and forfeitures incurred by the commission of offenses against the law are of a quasi-criminal nature, and we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment, which declares that no person shall be compelled in any criminal case to be a witness against himself." Also, he quotes from *Lees v. U. S.*, 150 U. S. 476, 480, an action to recover a penalty for importing an alien un-

der contract to perform labor, as follows: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself." Then the opinion goes on as follows: "In the present case the action against *Stone* is purely civil. \* \* \* In the criminal case the government sought to punish a criminal offence, while in the civil case it only seeks in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show beyond a reasonable doubt, the existence of some fact essential to establish the offence charged, while the same evidence in a civil action brought to recover the value of the property illegally converted, might have been sufficient to entitle the government to a verdict." Then he distinguishes further by saying "a criminal intent" was necessary to be proved in the criminal and not in the civil suit.

Taking the *Coffey* and *Stone* cases together, and especially the extracts we make about higher degree of proof and intent in criminal cases and we must conclude that the rule of *res judicata* is limited to actions for penalties and because under the federal Constitution they are in effect criminal cases. But Justice Blatchford said in the *Coffey* case in rejecting what was urged as to proof beyond a reasonable doubt in the prosecution and preponderance of proof in action for the penalty that: "Nevertheless, the fact or act has been put in issue and determined against the United States." Had not "the fact or act," in the *Stone* case, of timber having been unlawfully cut, i. e., converted, "been put in issue and determined against the United States?"

It seems hard to reconcile the reasoning in the two opinions, and still harder to see how it only requires a preponderance of evidence to prove the incurring of a penalty under a federal statute.

*United States v. Donaldson-Shutz Co.*, 148 Fed. 581, 70 C. C. A. 403, decided by Fourth circuit court of appeals, was a suit in equity brought under Section 3542, U. S. R. S., for the removal of an obstruction from a navigable stream and defendant pleaded that he had been prosecuted under that section criminally for violating said section with regard to the same obstruction, and had been acquitted, and this was a bar. In overruling this defense the opinion argues as in the *Stone* case, but singularly omits all citation of, or reference to it. The opinion would have saved some elaborateness of discussion, and the apparent doubt the writer of the opinion seemed to feel regarding the correctness of his conclusion. This doubt led him to say, in effect, that if the law, as announced in the *Coffey* case, was correct, then the Government would be hampered in its duty to the public with regard to navigable streams by the uncertainties and vicissitudes of a criminal trial, and this was sufficient reason for the rule in the *Coffey* case not being applied. It is somewhat strange the *Stone* case was not referred to, as the decision was then nearly ten years old.

This case but serves to further show the infirmity of the ruling in the *Coffey* case, which the supreme court has held to so tenaciously.

Forfeiture was made the test, and yet here we seem to get a case very like unto forfeiture, and the rule is not applied, because it would defeat performance by the government of the duty to keep open a navigable stream. We take it, that, if defendant was acquitted of the charge of obstructing a navigable stream, then the structures, he had placed in the stream as found not to constitute an obstruction, and when the government takes a proceeding in equity to remove same this amounts to declaring his property in those structures forfeited, if a decree goes against him. That approaches so closely to a penalty as to be scarcely distinguishable therefrom.

We hope at some time to see it clearly reasoned out how in the face of the Coffey and Boyd cases it can be that only a preponderance of proof, is required to establish proof to recover a penalty under federal statute. State decision we believe to be, as stated by Judge Whitney.

We have advanced the proposition that if an acquittal operated as a bar to a civil suit for a penalty, in the same transaction, then it would seem, that a defendant could claim he should be first tried criminally or that the same certainty of proof be required to recover for the penalty as in a criminal case. We find in *State v. Gordon*, 73 N. H. 434, 62 Atl. 1044, an action to recover on the bond of a licensed liquor dealer, it was contended that a conviction was first necessary to establish a breach of the bond. The court said: "Liability on the bond may exist without criminal liability on the part of the licensee; and to hold that a licensee could not be held on his bond unless previously convicted upon indictment or information, would be to defeat the plain intent of the act."

Another contention was that previous acquittal barre the suit on the bond. As to this the court quotes 1 Gr. Ev. sec. 537, as follows: "As a general rule, a verdict and judgment in a criminal case cannot be given in evidence in a civil action to establish the facts on which it is rendered. The same principles render a judgment in a civil action inadmissible evidence in a criminal prosecution." In speaking of civil proceedings for penalties the court says: "It is only where the object of both proceedings is punishment that any well-considered authorities are to be found holding that a judgment in one case is an estoppel in the other. If the purpose of the civil action granted the state was the punishment of offenders, it is a penal statute; but if the purpose was the recovery by the state of damages caused it by the licensee's wrongdoing, it is a remedial statute." Then the court goes on as to the case before it and holds that the recovery of a penalty for violating a liquor dealer's license by selling liquor to an intoxicated person was not punishment but a "penalty as a fixed sum, by way of indemnity to the public for the injury suffered by reason of the violation of the statute." The acquittal was held no bar, and in determining liability in the suit on the bond it was said: "Disputed questions of fact are determined by a valance of probabilities."

We do not know what would be a penalty, as punishment of the offender, if the above were not so, but we may conceive that this might

thus be held under state law and not under federal law. It was reasoned in the New Hampshire case, that the public, whom the state represented, "suffered" to this extent. The United States, however, represents no public that can suffer. It is an agency to represent sovereigns, according to delegated power and those sovereigns look to the welfare of citizens who constitute the public. But this theory comes back to the point, that a penalty in federal law is criminal in its nature and so deemed by Judge Harlan, under the Fourth and Fifth Amendments to the Constitution. C.

## JETSAM AND FLOTSAM.

### CONSTITUTION OF NEW MEXICO.

The constitution for the state of New Mexico, framed by the convention which adjourned at Santa Fe, on November 21, 1910, contains 20,000 words, 130 sections, grouped into 22 articles.

Probably no other commonwealth ever was confronted with the peculiar difficulties that faced the constitutional convention when it assembled. Unique and paramount, despite repeated denial, was the race and language question.

The 135,000 people of New Mexico who are of Spanish-American descent demanded protection of their equality before the law and retention of their ancient rights and privileges. They were suspicious of the federal enabling act, which demands that all the state officers and legislators must speak English.

The convention also bore in mind the advice of President Taft to formulate a "safe and sane" constitution, "a constitution unlike that of Oklahoma." It also had to take into consideration the insistent demands for progressive features, a demand out of which the Democratic minority naturally made political capital.

The various county debts, which the new state is to assume, the regulation of land donations of 13,000,000 acres, the regulation of liquor traffic and kindred questions had to be dealt with.

As a result a constitution following the older models was adopted with these salient new features:

An elective corporation commission having no judicial powers, but the rights to regulate rates for transportation and transmission; to grant charters and to supervise corporations; an automatic arrangement immediately takes the decisions of the commission to the state supreme court, which must pass upon them without delay.

The initiative was rejected but a referendum clause was included which enables 25 per cent of the voters, upon petition, to suspend a law within ninety days of a legislative session, and 10 per cent of the voters, upon petition, to submit a law passed by the last legislature to a popular vote at the next election, while a majority of the legislature may submit to the people constitutional amendments.

Prohibition and local option were excluded, but the way was left open to the next legisla-

ture to deal with these questions. A stringent anti-pass section was adopted.

The constitution raises a boundary dispute with Texas and Colorado; it provides for an elective judiciary from top to bottom, and for elective state officers. It limits the tax rate to 12 mills the first two years and 10 mills after that. It grants to women the right to vote at school elections and makes them eligible to be school directors and county school superintendents.

It also abolishes the fee system, at present the rule. It prohibits separate schools for Anglo-Saxons and Spanish-Americans and provides for payment by the state of the railroad bond indebtedness of \$1,000,000 through the sale of 1,000,000 acres of land granted by congress. No distinction is to be made in the franchise, in jury duty or in holding office, other than that of state and legislator on account of ability to speak English.

[Note: Possibly and most probably the constitution makers for the state of New Mexico felt a pressure in the peculiarity of the enabling act requiring congress to accept the fundamental law they were to prepare, instead of directing the president to declare the territory admitted upon its people adopting a constitution republican in form. Such a pressure could only have the effect of having the convention present a kind of stereotyped affair to which no objection could be made.]

It seems something of a pity that one of the two new states or both could not feel free to take advanced steps in reform of judicial procedure and in provision for Workmen's Compensation legislation, two needs which will ever exist with it or them.

Possibly both of these subjects had in them some dynamite, as corporate influence does not desire remedies to be more speedily enforced than they are being enforced, nor do they care for a basic law to be framed for the benefit of employees. Both of these things, however, would help to make a very popular document for the general voter.

It seems something of a novelty that a claimant for the rights of a sovereignty should have to be so very cautious in having to speak up for the general rights of its people. Of all situations to which no semblance of duress should be applied that one in which a territory is framing a state constitution should be recognized.

EDITOR.]

#### COMPLAINT AS TO CANADIAN CASES APPEALED TO ENGLISH PRIVY COUNCIL.

A correspondent of our esteemed contemporary, The Canada Law Journal, writes very vigorously in the way of protest against the allowance of appeals to the Privy Council, in London, from the Supreme Court of Canada, in civil cases, where only questions of fact are involved.

After remarking that "It is said that the right of appeal to London is a bond of union with the empire, but if the judicial committee is going to adopt a practice of entertaining appeals of this nature and of interfering with Canadian judgments of this kind, it is likely in time to prove the reverse," he proceeds to give a sidelight to English administration of law, which, for its colonies, detracts somewhat from its being so

very practical as compared with results in this country. He speaks as follows:

"A word as to the cost of indulging this sentiment or whatever it is that leads us to have the judgments of our own courts reviewed in England. The party dissatisfied with the judgment of the Supreme Court of Canada in this case (*Gordon v. Horne*, 42 S. C. R. 240), employed a galaxy of legal talent in London. As solicitors he had Messrs. Armitage, Chapple and Macnaghten. As counsel, Sir Robert Finlay and Hon. M. M. Macnaghten, on the application for leave, and, on the hearing of the appeal, Mr. Buckmaster, K. C., and Hon. M. M. Macnaghten. A board consisting of Lord Macnaghten, Lord Atkinson, Lord Mersey and Lord Shaw heard the appeal and reversed the decision, and the taxed costs the losing party had to pay the above solicitors and counsel amounted to \$2,223, besides which he had his own solicitors and counsel to pay. The situation in Canada therefore is something like this. A man may establish his credibility to the satisfaction of the judge who saw and heard him, and of a majority of the Canadian judges before whom the case may come on appeal, but he is nevertheless liable to be summoned to London, England, and there learn that the Canadian judges were wrong in their estimate of him and be mulcted in thousands of dollars of costs.

There is still another aspect to the question of the advisability from a Canadian standpoint, of appeals to London in civil matters. It is probably safe to say that fifty per cent of the population of Vancouver are Americans. A like condition probably prevails in the prairie Provinces of Alberta, Saskatchewan and Manitoba. Into the provinces West of the Great Lakes, there has been a tremendous immigration of citizens of the United States and that immigration still continues. Sentiment, if it survives at all as regards the Western provinces, must give way to economic conditions. This element will see little sense in traveling across the Atlantic to have their law suits determined by English judges at enormous expense, when in their own country of origin they have been able to obtain a supreme court for the final determination of litigation the equal of any court existing in England. If they have been able to do this, why should Canadians not be able to do so? If it is deemed unwise to entrust the Canadian judiciary with the final determination of constitutional questions or of questions of great public interest, or of cases involving grave questions of law, by all means let us have them decided in England. It is not the writer's opinion, nor the opinion of many other Canadians that it should be deemed necessary to send even such questions as these to England for final determination.

With great submission, the writer maintains that the Judicial Committee of the Privy Council ought not to interfere with the decision of the courts of any part of the Empire in cases of any other description than those above mentioned, that when it interferes with judgments of courts of last resort in the colonies in cases of minor importance such as *Gordon v. Horne*, if it does not inferentially belittle such courts in the estimation of the public it at all events puts litigants to a burdensome and grievous expense, and that it misconceived its functions in granting leave to appeal in *Gordon v. Horne*, and in reversing the judgment of the trial judge and of the Supreme Court of Canada in that case.

Eight thousand miles is a long distance for a party to travel for the purpose of endeavoring to demonstrate that the judges in his own country correctly estimated his credibility."

#### FREDERICK W. LEHMANN FOR SUPREME JUDGE.

This Journal never interests itself in politics but the judicial appointments of President Taft have been so free from this embarrassing consideration as to encourage us, as it does every other independent legal periodical to assist the president by whatever suggestion we may have to make.

The appointment of Justice Hughes was a master stroke. It indicated on the part of the president an intention to place such men on the supreme bench, who are not only able men as lawyers but have the confidence of the people of the states.

While we do not think there should be any hard and fast rule on the selection of appointees to the highest court in this land, we suggest that public confidence would be greatly increased by the appointment of men not already holding federal appointments.

For that reason we commend the suggestion that has been made to the president to appoint as a representative of the Eighth Judicial District, to the Supreme Court, the Hon. Frederick W. Lehmann, of St. Louis.

In the prime of a vigorous manhood and intellect, extremely popular with both the bar and the people, a former president of the American Bar Association, a finished scholar and an enthusiastic student of current legal problems, Mr. Lehmann would bring to the highest court a wealth of resource and public confidence which would raise the greatest of all legal tribunals to a still further height of surpassing ability over all the judicial tribunals of earth.

Whether this appointment be made now or at some future time it would be one that would be received with that public and professional approval that greeted the appointment of Judge Charles E. Hughes.

A. H. R.

#### BOOK REVIEWS.

##### STREET RAILWAY REPORTS, VOL. VI.

This series of reports is for the reporting of all decisions in street railway cases in federal courts and courts of last resort of all the states from April 1st, 1903, and important cases decided by lower courts of appellate and original jurisdiction not reported in any other series. The estimate of publishers is that they will appear at the rate of about two volumes per year.

Many of the cases are annotated and to this volume is annexed an index to special notes in the series. The annotations, judging from the volume under our eye, seem quite exhaustive and the series ought to be popular.

The typography and paper are excellent, the binding in law buckram and the volume is published by Matthew Bender & Co., Albany, N. Y. 1910.

#### BOOKS RECEIVED.

History of the Sherman Law of the United States of America. By Albert H. Walker. Price, \$2.00. New York. The Equity Press. Review will follow.

The Federal Penal Code of 1910. In Force January 1, 1910. Together with other Statutes having Penal Provisions in Force December 1, 1908. Annotated by George F. Tucker and Charles W. Blood. Price \$5.00 net. Boston, Mass. Little, Brown and Company. Review will follow.

Ethical Obligations of the Lawyer. By Gleason L. Archer, LL. B. Price, \$3.00 net. Boston, Mass. Little, Brown and Company. Review will follow.

American State Reports containing the Cases of General Value and Authority—Subsequent to those contained in the "American Decisions" and the "American Reports"; decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated by A. C. Freeman, Vol. 133. San Francisco, California. Bancroft-Whitney Company. Review will follow.

#### HUMOR OF THE LAW.

A Scottish gamekeeper found a boy fishing in his master's private waters, says an exchange. "You musn't fish here!" he exclaimed. "These waters belong to the Earl of A—." "Do they? I didn't know that," replied the culprit; and, laying aside his rod, he took up a book and commenced reading. The keeper departed, but, on returning about an hour afterwards, he found the same youth had started fishing again. "Do you understand that this water belongs to the Earl of A—?" he roared. "Why, you told me that an hour ago!" exclaimed the angler, in surprise. "Surely the whole river don't belong to him? His share went by long ago!"

A police judge in a northern city, on a fervid summer morn, had a large number of arrests before him, and he was hurrying along to get out of the atmosphere.

The colored element greatly predominated and as the trials proceeded a large negro was called and as he appeared in proximity to his honor, the court said:

"What are you charged with?"

"Deed, boss, I ain't done it, I is 'cused of fragrancy."

"Guilty!" howled the court. "Take him away!"

"The directors of the road were a precious lot of grafters."

"You don't say so!"

"Yes, every last man of them had his appendix removed and charged the cost to operating expenses."

Magistrate: You are charged with hitting this man with a bottle filled with liquid.

Prisoner: Yes, your honor, but it was only a soft drink—just ginger ale.

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of  
ALL the State and Territorial Courts of Last  
Resort, and of all the Federal Courts.**

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1. **Abatement and Revival**—Pleading.—Matters in abatement and matters in bar cannot be pleaded together.—*Carroll v. Building Committee of Emmanuel M. E. Church, South, Md.*, 77 Atl. 128.

2. **Accord and Satisfaction**—Liquidated Claim.—Acceptance of a part of the amount of a liquidated claim in satisfaction of the whole, if supported by some additional consideration, constitutes an accord and satisfaction.—*Scheffenacker v. Hoopes, Md.*, 77 Atl. 130.

3. **Action**—Accounting.—In a suit to recover a partner's interest in the firm, defendant's answer praying for an accounting, held to change the action to one triable in equity.—*Bigham v. Tinsley, Mo.*, 130 S. W. 506.

4. **Adverse Possession**—Actual Possession.—To constitute actual possession of land, it is only necessary to exercise such dominion over it or to use it in accordance with its present adaptability.—*Alabama State Land Co. v. Matthews, Ala.*, 53 So. 174.

5. **Highways**—Any user by adjoining owners of a public alley for the purposes of an alley cannot be presumed adverse to the public's right.—*Koshland v. Cherry, Cal.*, 110 Pac. 143.

6. **Appeal and Error**—Jurisdictional Amount.—To determine the appellate jurisdiction the court will not be controlled by a mere colorable amount in controversy, but may look to the whole record to ascertain the real amount in controversy.—*Cherry v. Cherry, Mo.*, 130 S. W. 494.

7. **Assignments**—Equitable Assignments.—A writing is not essential to support an equitable assignment of a chose in action.—*Smith v. Penn-American Plate Glass Co., Md.*, 77 Atl. 264.

8. **Public Officers**—An assignment by a public officer of his fees or compensation to be earned in the future, is contrary to public policy and void.—*Stewart v. Sample, Ala.*, 53 So. 182.

9. **Sale of Assets**—An assignment by a receiver in bankruptcy of the bankrupt's bills receivable held to pass as an incident a bond to dissolve an attachment in an action by the bankrupt.—*Rogers v. Abbot, Mass.*, 92 N. E. 472.

10. **Attorney and Client**—Attorney's Lien.—The judgment debtor may pay the entire judgment to the judgment creditor in the absence of notice that the creditor's attorney claims a lien.—*Dahlstrom v. Featherstone, Idaho*, 110 Pac. 243.

11. **Dealings Between**—An attorney, after severing his connection with a client, cannot appear against such client in matters hostile to his interests connected with the subject of his former employment.—*Peirce v. Palmer, R. I.*, 77 Atl. 201.

12. **Summary Proceedings**—Where a contract to serve in a divorce suit as a detective is contra bonos mores, the payment of money by an attorney in whose hands it had been placed for the detective held not enforceable in a summary proceeding against the attorney as a member of the bar.—*Murray v. Lizotte, R. I.*, 77 Atl. 231.

13. **Bailment**—Duty of Bailee.—A bailee who receives property for safe-keeping is bound to deliver it to the bailor upon demand, unless he has a lien on it or is prevented from so doing by the real owner, or act of law.—*Bates v. Capital State Bank, Idaho*, 110 Pac. 277.

14. **Bankruptcy**—Concealment of Assets.—Bankrupt, conveying property to near relative without consideration, and failing to disclose it, in schedules, held prima facie guilty of concealing assets.—*In re McCann*, 179 Fed. 575.

15. **Contempt Proceedings**—A referee in bankruptcy may certify contumacious conduct of the bankrupts to the court for its action, without notice to the bankrupts.—*In re Magen*, 179 Fed. 572.

16. **Debts Entitled to Priority**—In the distribution of the estate of a bankrupt, the actual and necessary cost of preserving the estate subsequent to filing the petition, which is an expense necessary to enable the court to exercise its jurisdiction, is entitled to priority of payment over taxes due the state.—*State of New Jersey v. Lovell*, 179 Fed. 321.

17. **Discharge**—Where a bankrupt failed to obtain a discharge, although his petition was dismissed for want of prosecution, and not on

the merits he is not entitled to a discharge in a second bankruptcy proceeding from the debts provable in the first.—*Pollet v. Cosel*, 179 Fed. 488.

18.—**Landlord and Tenant.**—A landlord has no lien on distrainable property as against the bankrupt tenant's trustee unless he has levied his distrain before the filing of the petition in bankruptcy.—*In re Potee Brick Co. of Baltimore City*, 179 Fed. 525.

19.—**Payment by Receiver.**—On a bankrupt's appeal from an involuntary adjudication, he was not entitled to an order requiring his receiver to pay the cost of printing the record out of the funds of the estate in his hands.—*Herman Keck A.f.g. Co. v. Lorsch*, 179 Fed. 485.

20.—**Preference.**—In an action by a trustee in bankruptcy against the bankrupt's accommodation indorser to recover a preference, the burden was on the trustee to prove that the bankrupts intended thereby to prefer defendants, and that defendants knew or had reasonable cause to believe that a preference was intended.—*Reber v. Louis Shulman & Bro.*, 179 Fed. 574.

21.—**Receiver's Certificate.**—Where a creditor was held not bound to return an improper payment, unless the amount of the payment exceeded the amount the creditor was entitled to receive out of the fund in the hands of a bankrupt's receiver, such question could be determined on an accounting before a master, based on a rule to show cause.—*In re C. M. Burkhalter & Co.*, 179 Fed. 403.

22.—**Removal of Fixtures on Leasehold.**—Under a lease of property to a bankrupt, neither the bankrupt nor his trustee or mortgagee are authorized to remove property annexed to the freehold until and unless all the rents in arrears had been paid, whether the property was trade fixtures or not.—*In re Potee Brick Co. of Baltimore City*, 179 Fed. 525.

23.—**Selection of Trustee.**—Creditors should not be denied the right to a voice in the selection of a bankrupt's trustee, because they had named as their attorney one who had acted as attorney for the bankrupt.—*In re Kaufman*, 179 Fed. 552.

24.—**Benefit Societies.**—Forfeitures.—Though a forfeiture of an insurance contract has taken place, it will be treated as waived, if insurer accepts a premium thereafter falling due and retains it.—*Francis v. Supreme Lodge A. O. U. W., Mo.*, 130 S. W. 500.

25.—**Presumption of Death.**—To raise a presumption of death from absence, plaintiff was bound to show diligent effort to locate insured, and that she had exhausted every source of information in her power.—*Brown v. Grand Lodge of Ancient Order of United Workmen of California, Cal.*, 110 Pac. 351.

26.—**Bills and Notes.**—Interest.—In action on check against maker who had stopped payment, instruction requiring allowance of interest, instead of leaving it to the discretion of the jury, held proper.—*Weant v. Southern Trust & Deposit Co., Md.*, 77 Atl. 289.

27.—**Renewal.**—The giving of one note in renewal of another, by which the time of payment is extended, is a continuance of the original indebtedness.—*Johnson v. Grayson, Mo.*, 130 S. W. 673.

28.—**Brokers.**—Right to Compensation.—Where agents for the parties to a sale of land agree

between themselves to divide the commissions received from their principals, they are not entitled to compensation, though the principals themselves finally conclude the sale on terms agreed upon.—*Scott v. Kelso, Tex.*, 130 S. W. 610.

29.—**Carriers.**—Injuries to Passengers.—A carrier is not liable for an assault on a passenger by an agent or employee, unless the assault was committed while the agent or employee was acting within the scope of his employment.—*Philadelphia, B. & W. R. Co. v. Crawford, Md.*, 77 Atl. 278.

30.—**Certiorari.**—Grounds for Issuance.—A writ of review can only be granted when an inferior tribunal exercising judicial functions has exceeded its jurisdiction, and there is no appeal.—*Miles v. Justice's Court of Pasadena Tp., Los Angeles County, Cal.*, 110 Pac. 349.

31.—**Charities.**—Purpose of Gift.—A gift in trust for the payment of the debt of a state, if not defeated by illegal provisions, is a good, charitable gift.—*Girard Trust Co. v. Russell*, 179 Fed. 446.

32.—**Chattel Mortgages.**—Sale by Mortgagor.—Confirmation by a chattel mortgagee without compensation of the sale of a part of the mortgaged property held not binding on the mortgagee.—*Riner Lumber Co. v. O'Dwyer & Ahern Co., Ark.*, 130 S. W. 529.

33.—**Conspiracy.**—Civil Liability.—No action lies for conspiracy, unless the end sought to be accomplished was unlawful, or if lawful, the means for its accomplishment were unlawful.—*Boasberg v. Walker, Minn.*, 127 N. W. 467.

34.—**Evidence.**—In the prosecution of two school directors for a conspiracy to extort money from a school teacher, where the state proves a conspiracy between only one of the defendants and a third person, then the case is not proved.—*Bundy v. State, Ark.*, 130 S. W. 522.

35.—**Constitutional Law.**—Banks and Banking.—The bank depositors' guaranty act of Kansas, is not unconstitutional as denying to national banks within the state the equal protection of the laws.—*Dolley v. Abilene Nat. Bank of Abilene, Kan.*, 179 Fed. 461.

36.—**Contracts.**—Acceptance of Work.—One accepting work not in accordance with the contract, with full knowledge and paying therefor, held to waive his right to damages for the breach.—*Sirch Electrical & Testing Laboratories v. Garbutt, Cal.*, 110 Pac. 140.

37.—**Binding Effect.**—Contract held binding on one in the absence of fraud or mistake, though he does not read it and is not familiar with its terms.—*Bakhaus v. Caledonian Ins. Co., Md.*, 77 Atl. 310.

38.—**Form.**—Contract actually entered into held binding, though it was expected that the terms would be embodied in written instrument and signed.—*C. C. Emerson & Co. v. Stevens Grocer Co., Ark.*, 130 S. W. 541.

39.—**Public Policy.**—An agreement to compensate a witness in excess of the legal fees for attending as a witness and testifying as to facts within his knowledge held contrary to public policy and void.—*Clifford v. Hughes*, 124 N. Y. Supp. 478.

40.—**What Law Governs.**—The capacity of an operatic singer, domiciled in the United

States, to contract for services in the United States, is governed by the laws of that country, though the contract was made in France.—*Hammerstein v. Sylva*, 124 N. Y. Supp. 535.

41. **Corporations—Liability of Stockholders.**—The right of a creditor of a corporation to recover from a stockholder rests on the contractual liability of the stockholder to the corporation.—*Pittsburg Steel Co. v. Baltimore Equitable Society, Md.*, 77 Atl. 255.

42. **Purchase of Corporate Stock.**—A corporate president held to have no power to purchase stock on behalf of the corporation to pay for unpaid subscription.—*Tiger Bros. v. Rogers Cotton Cleaner & Gin Co., Ark.*, 130 S. W. 535.

43. **Service of Process.**—It is within the province of the legislature to designate the person or persons who represent a foreign corporation upon whom legal process may be served.—*Bristol v. Brent, Utah*, 110 Pac. 356.

44. **Title to Realty.**—Without statutory authority, a Massachusetts corporation may acquire title to real estate.—*Hubbard v. Worcester Art Museum*, 179 Fed. 406.

45. **Costs—Parties Liable.**—In a suit against two connecting carriers, held, that costs incurred by a successful defendant should have been taxed against plaintiff who appeared to have caused the suit against defendant, and not against the other defendant, against whom judgment was rendered.—*Texas Cent. R. Co. v. Shirley, Tex.*, 130 S. W. 687.

46. **Courts—Appellate Jurisdiction.**—Where the petitioner for a divorce demanded both in her petition and in her reply alimony in gross to the amount of \$50,000 the Supreme Court would have jurisdiction of the case on appeal.—*Cherry v. Cherry, Mo.*, 130 S. W. 494.

47. **Public Questions.**—The Court of Appeals should express its opinion on a public question upon dismissing an appeal very rarely, if at all.—*Thom v. Cook, Md.*, 77 Atl. 120.

48. **Rules of Decision.**—Whether the doctrine *res ipsa loquitur* applies to an action for injuries to a servant is a question of general law, concerning which the federal courts are governed by their own decisions.—*Patton v. Illinois Cent. R. Co.*, 179 Fed. 530.

49. **Covenants—Breach.**—A right of action for breach of warranty of title does not run with the land.—*Crawford County Bank v. Baker, Ark.*, 130 S. W. 556.

50. **Creditors' Suit—Right to Remedy.**—Ordinarily, a judgment creditor before he can invoke equity in aid of his judgment must allege that he has exhausted his legal remedies.—*Rolapp v. Ogden & N. W. R. Co., Utah*, 110 Pac. 364.

51. **Criminal Evidence—Almanacs.**—Admission of almanac stating that its calculations were in solar time held not to require evidence explaining the difference between solar and standard time.—*State v. Murray, Kan.*, 110 Pac. 103.

52. **Declarations.**—A witness is incompetent to testify to a declaration made by a party when it is necessary to have it translated before it can be understood by the witness.—*People v. Petruzo, Cal.*, 110 Pac. 324.

53. **Criminal Law—Appeal.**—Where the record fails to show proof of all the essential elements of an offense, the Circuit Court of Appeals may set aside the conviction, though the

objection was not properly made.—*Ripper v. United States*, 179 Fed. 497.

54. **Expert Testimony.**—An expert may be cross-examined to test his competency, as well as to affect his credibility.—*Davis v. State, Ark.*, 130 S. W. 547.

55. **Criminal Trial—Review.**—The question whether there was sufficient evidence to warrant the submission of a criminal case to the jury cannot be raised for the first time in the appellate court.—*Brina v. United States*, 179 Fed. 373.

56. **Death—Action for Negligent Death.**—One suing for the negligent death of his intestate may show that the intestate left children.—*Louisville & N. R. Co. v. Young, Ala.*, 53 So. 213.

57. **Dedication—Acceptance of Highway.**—In ascertaining whether or not a public place has been accepted by user, the purpose which the place is intended to serve must be the standard by which to determine the use constituting an acceptance.—*Koshland v. Cherry, Cal.*, 110 Pac. 143.

58. **Deeds—Construction.**—Where the habendum clause in a deed conflicts with the plain and unambiguous term of the grant in the premises of the deed, the latter must prevail.—*Callaway v. Forest Park Highlands Co. of Baltimore City, Md.*, 77 Atl. 141.

59. **Inadequacy.**—Before inadequacy of price is ground for cancelling a conveyance, it must be so gross that it shocks the conscience.—*McDonald v. Smith, Ark.*, 130 S. W. 515.

60. **Divorce—Jurisdiction.**—Question as to the sufficiency of the evidence to establish residence on the part of complainant in divorce can be reviewed only by appeal, and not by original proceedings in the Supreme Court.—*McKim v. District Court of Second Judicial District of Nevada, Nev.*, 10 Pac. 4.

61. **Electricity—Negligence.**—An employee of a telephone company held not a mere licensee on the pole of another telephone company and an electric light company, but there by invitation, so that the other companies were under duty not to endanger his safety by shock.—*Downs v. Andrews, Mo.*, S. W. 472.

62. **Eminent Domain—Additional Servitude.**—The inauguration of a new use of a highway, under proper authority within the general purposes for which the highway was created, is not a taking or damaging of the property of the abutting owner within the constitution.—*Klipp v. Davis-Daly Copper Co., Mont.*, 110 Pac. 237.

63. **Changing Street Grade.**—That a city gave its consent to a change of street grade by a railroad company did not render the work compulsory, nor relieve the railroad company from liability to abutting owners for damages sustained thereby.—*International & G. N. R. Co. v. Bell, Tex.*, 130 S. W. 634.

64. **Public Uses.**—The question of what is a public use for which land may be taken, held a judicial question.—*Tuolumne Water Power Co. v. Frederick, Cal.*, 110 Pac. 134.

65. **Purposes of Appropriation.**—It was no objection to the condemnation of land to widen a highway that the commissioners' court intended to permit the highway, as widened, to be used for street railway purposes.—*Stewart v. El Paso County, Tex.*, 130 S. W. 590.

66. **Evidence**—Public Grants.—A grant by a state is evidence of title of a higher order than ordinary conveyances and is not subject to collateral attack unless void on its face.—Payne & Butler v. Providence Gas Co., R. I., 77 Atl. 143.

67. **False Imprisonment**—Lawful Arrest.—An action for false imprisonment may not be maintained for an arrest which is lawful, no matter at whose instigation or for what motive the arrest was made.—Wehmeyer v. Mulvihill, Mo., 130 S. W. 681.

68. **Federal Courts**—Following State Decisions.—Upon the question of the measure of damages in an action in a federal court for breach of a covenant of quiet enjoyment in a lease, the court is governed by the decisions of the highest court of the state where the property is situated, so far as they determine the question.—Thorley v. Pabst Brewing Co., 179 Fed. 338.

69. **Fire Insurance**—Forfeitures.—Insurance contracts not to be construed to work a forfeiture unless it plainly appears that such was the intention of the parties.—Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co., Wash., 110 Pac. 36.

70.—**Interest**—The amount of a loss under a fire policy held not to draw interest, until after 60 days from receipt of proof of loss.—Hamburg-Bremen Fire Ins. Co. v. Swift, Tex., 130 S. W. 670.

71.—**Liability of Agent**—An insurance agent may become liable to one insured, where the insurance is placed in a company known to be insolvent or not authorized to do business in the state.—Beckman v. Edwards, Wash., 110 Pac. 6.

72.—**Unconditional Ownership of Property**—Conditions of a fire policy as to sole and unconditional ownership held waived by a rider making loss payable to assured, "as interest may appear."—Bakhaus v. Caledonian Ins. Co., Md., 77 Atl. 310.

73. **Garnishment**—Attorney and Client.—The treasurer of a building association may, through the counsel of the association, issue an attachment execution against the stock of a member for private debt, and summon himself, as treasurer, as the garnishee.—Egolf Building & Loan Ass'n. v. Cleaver, Pa., 77 Atl. 245.

74.—**Debts Attachable**—A debt that may be enforced in any jurisdiction by a person against his debtor may also by a creditor of such person be attached by garnishment in any jurisdiction where the debtor of such person may be found and served with process.—Bristol v. Brent, Utah, 110 Pac. 356.

75.—**Property Subject**—The unearned fees and salary of a public officer cannot be reached by attachment, garnishment, or other legal proceeding.—Roesch v. W. B. Worthen Co., Ark., 130 S. W. 551.

76.—**Submission of Issues**—The submission of garnishment proceedings to a jury on special issues at garnishee's request lies within the trial court's sound discretion, which is revisable only for abuse.—Milwaukee Mechanics' Ins. Co. v. Froesch, Tex., 130 S. W. 600.

77. **Guaranty**—Action on.—A guarantor, sued with the principal debtors, held entitled only to a judgment over for the amount he is compelled to pay on the judgment for the creditor.—Harris v. Wisdom, Tex., 130 S. W. 622.

78. **Habeas Corpus**—Custody of Child.—The court is invested with some discretion upon application of a father who seeks to take away his child from a home to which she was sent by the juvenile court for her protection and proper rearing.—State v. Melancon, La., 53 So. 161.

79.—**Errors and Irregularities**—Errors and irregularities in a judgment for contempt of court, not going to the jurisdiction, are not reviewable on habeas corpus.—State v. Langum, Minn., 127 N. W. 465.

80. **Homicide**—Arrest Without Authority.—Where an arrest is made by a known officer without authority, and nothing is to be reasonably apprehended beyond a mere temporary detention in jail, resistance cannot be carried to the extent of taking life.—State v. Meyers, Or., 110 Pac. 407.

81. **Husband and Wife**—Contracts Between.—While law courts will not enforce a contract between husband and wife, equity will, when the contract is fair.—McDonald v. Smith, Ark., 130 S. W. 515.

82.—**Personal Property of Wife**—A husband may waive his marital rights in his wife's property, either by express declaration or by conduct justifying such an inference.—Smith v. Farmers' & Merchants' Nat. Bank, Or., 110 Pac. 410.

83. **Injunctions**—Operative Services.—Where the services of an operative singer are extraordinary, an injunction may be granted to prevent her singing for any other manager than the one with whom she has contracted to sing.—Hammerstein v. Sylva, 124 N. Y. Supp. 335.

84.—**Right to Writ**—A temporary injunction, granting all the relief that can be granted at the end of the litigation, will not be allowed, unless it clearly appears that plaintiff's contention is right and that he will be seriously injured if the writ is not granted.—Way v. Hayes, 124 N. Y. Supp. 648.

85. **Insurance**—Attorney's Fees.—A statute allowing the taxation of attorney's fees against insurance companies is within the police power of the state.—Federal Union Surety Co. v. Flemlister, Ark., 130 S. W. 574.

86. **Interest**—Calculation of Interest.—In an action on a note, the calculation of interest is for the jury, even where a peremptory instruction to find for plaintiff is proper.—Johnson v. Grayson, Mo., 130 S. W. 673.

87. **Intoxicating Liquors**—Civil Action by Wife.—In an action on a liquor dealer's bond, a wife must give some evidence from which the jury may estimate the damage.—Campbell v. Johnson, S. D., 127 N. W. 468.

88. **Judgment**—Confession.—To render a judgment by confession binding held necessary that it be entered by mutual consent, indicated by the party's personal presence and request, or by his authorization in writing or through an attorney.—Horner v. Poplein, Md., 77 Atl. 252.

89.—**Presumptions**—A judgment rendered by a United States court is entitled to equal rank and presumption of regularity as judgments of the circuit courts of this state.—Kahn v. Mercantile Town Mut. Ins. Co., Mo., 130 S. W. 492.

90.—**Res Judicata**—Where a servant employed for a year at a fixed salary, payable monthly, recovers judgment for the first month's salary, it is res judicata in a second suit for damages arising from a breach of the contract.

—Stradley v. Bath Portland Cement Co., Pa., 77 Atl. 242.

91. **Landlord and Tenant**—Termination of Lease.—Termination of lease by forfeiture or expiration of the term held not necessarily to terminate the bankrupt's right to remove fixtures, after payment of rent in arrears.—In re Potee Brick Co. of Baltimore City, 179 Fed. 525

92. **Libel and Slander**—Privileged Communications.—One is justified in giving in good faith his opinion of the integrity and standing of a tradesman in response to an inquiry concerning him.—Melcher v. Beeler, Colo., 110 Pac. 181.

93. **Life Insurance**—Action to Restore Forfeited Policy.—The beneficiary under a life policy forfeited by the insurer held not a necessary party to an action by insured to restore it.—Prichard v. Security Mut. Life Ins. Co., 124 N. Y. Supp. 650.

94. **Life Estates**—Improvements.—The equitable right to compensation for betterments made by a life tenant held not in strictness to constitute a lien on the estate.—Humphrey v. Gerard, Conn., 77 Atl. 65.

95. **Limitation of Actions**—Accrual of Cause of Action.—A cause of action for breach of warranty of title accrues at the time of the conveyance, and not when the contract to convey is made.—Crawford County Bank v. Baker, Ark., 130 S. W. 556.

96. **Master and Servant**—Duty of Master.—A servant held entitled to presume that the master has discharged the duties imposed by law to guard employees from danger.—Kent Mfg. Co. v. Zimmerman, Colo., 110 Pac. 187.

97.—Existence of Relation.—Where a master loans his servants with their consent to a third person to perform certain work, the third person for the time being is the master.—Wolfe v. Mosler Safe Co., 124 N. Y. Supp. 541.

98.—Safe Place to Work.—The doctrine of a safe place of work held inapplicable to one employed to assist in loading and unloading steel plates on a truck.—Mercer v. Lloyd Transfer Co., Wash., 110 Pac. 389.

99.—What Law Governs.—An injury to a servant having occurred in Tennessee, and the negligence of the master, if any, having occurred there, the law of that state, and not of Alabama, must control as to the duties and liabilities of the master.—Louisville & N. R. Co. v. Cook, Ala., 53 So. 190.

100. **Mortgages**—Covenants.—A covenant by a mortgagee as to releasing parts of the mortgaged property upon payment of a certain price, being with the mortgagor, not with him and his assigns, was a personal agreement for his benefit, and not for the benefit of any one claiming through or under him.—Clarke v. Cowan, Mass., 92 N. E. 474.

101.—Forged Mortgage.—Where A's son forged her name to a mortgage, and after discovering it she made two payments of interest thereon, held, that her duty to inform the mortgagee of the forgery did not estop her from invalidating it.—Rothschild v. Title Guarantee & Trust Co., 124 N. Y. Supp. 441.

102.—Prior Mortgage.—Where actual notice was given the president of a bank of the existence of a prior unrecorded mortgage on certain property, after such notice a mortgage taken by the bank became inferior to the prior

mortgage.—Hampshire v. Greeves, Tex., 130 S. W. 665.

103. **Municipal Corporations**—Personal Injuries.—There is no difference between the liability for personal injuries of a municipal corporation, charged under its charter with the duty of keeping its streets in a safe condition, and that of an individual.—City of Havre de Grace v. Fletcher, Md., 77 Atl. 114.

104.—Powers.—Municipalities can exercise only such powers as are expressly or by necessary implications conferred upon them.—Platt v. City and County of San Francisco, Cal., 110 Pac. 304.

105. **Negligence**—Dangerous Premises.—A fireman entering defendant's premises in response to a fire alarm, and dying from the results of breathing acid fumes mistaken for smoke, held not an invitee, but a mere licensee for whose death defendant was not liable.—Lunt v. Post Printing & Publishing Co., Colo., 110 Pac. 203.

106.—Violation of Duty.—Negligence is bottomed on duty, so that without duty there can be no liability for negligence.—Downs v. Andrews, Mo., 130 S. W. 472.

107.—Wanton Action.—A "wanton action" is not mere negligence, but means an action recklessly disregardful of right or consequences.—Marra v. New York Cent. & H. R. R. Co., 124 N. Y. Supp. 443.

108. **Officers**—Removal.—Where an officer is removable at pleasure, his removal may be effected, so far as title to office is concerned, by declaration of removal, but his responsibility for his official acts continues until notice of removal.—State v. Roney, Ohio, 92 N. E. 486.

109. **Partnership**—Dissolution.—Where one partner sold his interest to his copartner and the latter sued for the price, the sale was conclusive as a settlement of firm matters between them, except for fraud or mistake.—Elgham v. Tinsley, Mo., 130 S. W. 506.

110. **Perpetuities**—Rule of Construction.—A liberal rule of construction is applied to trusts for public charitable purpose, and they will be sustained where private trusts would be held invalid as in violation of the rule against perpetuities.—Girard Trust Co. v. Russell, 179 Fed. 446.

111. **Pleading**—Contributory Negligence.—Pleas of contributory negligence or assumption of risk must state facts constituting such negligence or assumption, and it is not sufficient to state them as mere conclusions.—Mobile Electric Co. v. Sanges, Ala., 53 So. 176.

112.—Motion for Judgment.—A motion for judgment on the pleadings cannot be sustained unless under the admitted facts the moving party would be entitled to judgment without regard to what the findings might be on facts upon which issue is joined.—Thomas v. Ray, Colo., 110 Pac. 77.

113. **Principal and Surety**—Discharge of Surety.—To release a surety on a note, on the ground of the extension of the time of payment, there must be a contract of extension supported by a valid consideration, and a contract is not shown by a mere notation on the note that interest was paid on a certain date to a certain future date.—Elliot v. Qualls, Mo., 130 S. W. 474.

114. **Railroads**.—Negligent Operation of Trains.—It is negligence per se to run a train in a city in excess of the speed fixed by an ordinance, and where it directly contributes to an injury the railroad is liable therefor.—Neary v. Northern Pac. Ry. Co., Mont., 110 Pac. 226.

115.—Who Are Passengers.—If one enters a car in good faith honestly believing in his ticket, he is a passenger from the time he tends his fare and is entitled to all of the indulgences which the law accords persons in that relation.—Short v. St. Louis & S. F. R. Co., Mo., 130 S. W. 488.

116. **Reformation of Instruments**.—Intent of Parties.—Where a husband intended to take title to property in the name of himself and wife, his failure to do so did not create an obligation on the grantors to correct the mistake nor confer any right on the wife to have the deed reformed.—Langley v. Kessler, Or., 110 Pac. 401.

117. **Sales**.—Acceptance.—Where there was a custom for the seller to notify the buyer by wire of acceptance of orders made by wire, a delay of four days justified the buyer in canceling the order.—Ferguson v. West Coast Shingle Co., Ark., 130 S. W. 527.

118.—Payment by Check.—Where a check is given in payment of goods purchased and the check is dishonored, and the purchaser transfers the goods to another, the delivery to the first purchaser held to be conditioned on payment, and the second purchaser takes no title.—Johnson v. Iankovetz, Or., 110 Pac. 398.

119. **Specific Performance**.—Options.—The lessee entering into possession and making improvements under the lease giving option to buy held entitled to specific performance as to the option.—Richardson v. Harkness, Wash., 110 Pac. 9.

120.—Parties.—Where a vendor sells land to a third person with notice of a prior sale, the first vendee may compel a conveyance from the second vendee.—Ehrenstrom v. Phillips, Del., 77 Atl. 81.

121. **Street Railroads**.—Care Required of Motorman.—Since an electric street car moves more rapidly than a horse car and cannot be as readily stopped, a greater degree of care is required by the motorman.—Merrill v. Sheffield Co., Ala., 53 So. 219.

122. **Taxation**.—Tax Sale.—The county clerk has no authority, after three years from the date of a tax sale, where the property was bid in by the county treasurer to assign the certificate of purchase, and a tax deed issued thereon is invalid.—Treasury Tunnel, Mining & Reduction Co. v. Gregory, Colo., 110 Pac. 73.

123.—**Telegraphs and Telephones**.—Nondelivery of Message.—The failure of the sender of a message to have it repeated does not preclude a recovery of damages, caused by the negligence of the telegraph company in changing the address of the message.—Western Union Telegraph Co. v. Smith, Tex., 130 S. W. 622.

124.—Right to Sue.—The right of the addressee of a telegram to recover for delayed delivery held not affected by a rule printed on the message as delivered.—McGehee v. Western Union Telegraph Co., Ala., 53 So. 205.

125. **Tenancy in Common**.—Conveyances by Tenant.—A tenant in common may quitclaim his entire interest in the property, and thereby substitute his grantee as the owner of his undivided

interest.—Humphrey v. Gerard, Conn., 77 Atl. 65.

126.—**Irrigation Ditches**.—Where several persons are tenants in an irrigation ditch and dam at its source, each is responsible in proportion to his interest for repair and maintenance of the dam and ditch.—Carnes v. Dalton, Or., 110 Pac. 170.

127. **Territories**.—Employer's Liability Act.—Federal Employer's Liability Act held to supersede the laws of New Mexico Territory with reference to a railroad company's liability for injuries to an engineer in March, 1908.—Atchison, T. & S. F. Ry. Co. v. Tack, Tex., 130 S. W. 596.

128. **Theaters and Shows**.—Res Ipsa Loquitur.—The rule of res ipsa loquitur held not to apply to the injury of a circus patron by the blowing down of the tent.—King v. Ringling, Mo., 130 S. W. 482.

129. **Trade-Marks and Trade-Names**.—Nature of Trade-Name.—A trade-mark has reference to the thing sold, while a trade-name embraces both the thing sold and the individuality of the seller.—Eastern Outfitting Co. v. Mannheim, Wash., 110 Pac. 23.

130. **Trusts**.—Creation.—Where a trust is not created by a conveyance of the property, it may be declared by the grantee by a separate writing simultaneously with or subsequent to it, even although it be of the most informal character.—Golding v. Gaither, Md., 77 Atl. 333.

131.—Interest of Cestui Que Trust.—A court of equity has no power to authorize the diversion of any part of a trust fund to possession other than that specified in the instrument creating the trust.—Jones v. Jones, Md., 77 Atl. 270.

132. **Vendor and Purchaser**.—Drawing Lots by Chance.—A purchaser of lots allotted to him by chance under a contract held not to have lost his right to a refund of the money on being dissatisfied with the lots drawn because of delay in expressing his dissatisfaction.—Pirtle v. Felsenthal Land & Townsite Co., Ark., 130 S. W. 554.

133.—**Liens**.—A right to a vendor's lien is a personal right which may be waived without consideration or writing.—Royal Consol. Mining Co. v. Royal Consol. Mines, California, Co., Cal., 110 Pac. 123.

134.—**Statute of Frauds**.—Money paid on price of lots held recoverable, where the statute of frauds was not satisfied by a written memorandum.—Colonial Park Estate v. Massart, Md., 77 Atl. 275.

135. **Venue**.—Residence.—Where defendant resided during part of each year in several counties, he could be sued in any one of them.—Armstrong v. King, Tex., 130 S. W. 629.

136. **Wills**.—Codicils.—Dispositions under separate codicils should be reconciled if possible, and, if they are irreconcilable, the latest prevails.—Frelinghuysen v. New York Life Ins. & Trust Co., N. Y., 77 Atl. 98.

137.—**Codicils**.—A plain devise is not revoked by doubtful or ambiguous provisions in a codicil.—Lewis v. Payne, Md., 77 Atl. 321.

138. **Waters and Water Courses**.—Public Lands.—A federal government patent to land bordering on a nonnavigable pond held not to show an intent to only grant the upland so as to make the meander alone the boundary.—Faust v. Johnstone, Cal., 110 Pac. 294.